United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
JOHN F. DAVIDSON

75-7608

B

P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

BRIEF OF DEFENDANTS-APPELLANTS EDMUND T. DELANEY AND EMANUEL CELLER

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TABLE OF CONTENTS

TABLE OF CASES AND STATUTES

STATEMENT OF THE CASE

This is an appeal under 28 U.S.C. 1291 by defendants Edmund T. Delaney and Emanuel Celler (the "Unaffiliated Defendants") from the order of Judge Thomas P. Griesa, dated September 30, 1975, denying their motion for reargument of his opinion dated May 15, 1975 granting plaintiffs' class action motion.

In order to avoid unnecessary repetition, the Unaffiliated Defendants adopt the statement of the case and the arguments advanced in support of the contention that this action should be dismissed because it is unmanageable as a class action, set forth in the brief on behalf of the appellant Oppenheimer Fund, Inc. and the brief on behalf of the appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash (hereafter referred to as the "Oppenheimer Defendants"). This brief will discuss only the issue of whether the cost of identifying the members of the class is part of the cost of notice to members of the class required by Fed. R. Civ. P. 23(c)(2) and which consequently must be paid by plaintiffs.

RULE INVOLVED

Judge Griesa ruled that the action could proceed as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Rule 23 provides, to the extent relevant to this brief, as follows:

Rule 23. Class Actions

* * *

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

* * *

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

* * *

QUESTION PRESENTED

IN A CLASS ACTION, IS THE SUBSTANTIAL COST OF SPECIAL COMPUTER PROGRAMMING REQUIRED SOLELY TO IDENTIFY THE NAMES AND ADDRESSES OF MEMBERS OF THE CLASS TO WHOM NOTICE MUST BE SENT PURSUANT TO FED. R. CIV. P. 23(c)(2), PART OF THE COST OF NOTICE WHICH MUST BE PAID BY PLAINTIFFS, WHERE DEFENDANTS HAVE MADE AVAILABLE THEIR COMPUTERIZED BUSINESS RECORDS FROM WHICH SUCH INFORMATION MAY BE OBTAINED? PLAINTIFFS HAVE INDICATED THAT THEY WILL NOT MAINTAIN THE ACTIONS IF THEY ARE REQUIRED TO PAY SUCH COST.

SUMMARY OF ARGUMENT

The decision of this Court in Eisen III and the decision of the Supreme Court of the United States in Eisen IV both hold that the plaintiffs in class actions must pay the costs of the notice to members of the class required by Rule 23(c)(2) of the Federal Rules of Civil Procedure. Such notice necessarily entails the following elements:

(1) identifying the persons who are members of the class and ascertaining their addresses;

(2) preparing the form of notice to be given to them and printing or otherwise duplicating copies of such notice; and

(3) affixing the names and addresses of members of the class to mailing envelopes, inserting copies of the notice in such envelopes and mailing them.

There is no basis in the controlling precedents for holding that the costs of identifying class members may be differentiated from other elements of the cost of giving notice, which is indisputably to be borne by plaintiffs. Nor is there any basis in logic or policy for any such differentiation.

After Judge Griesa had correctly ruled that it would be arbitrary and improper for plaintiffs to reduce the size of the class by eliminating those shareholders who had sold their shares, it was manifestly illogical and erroneous to require the defendants to bear the cost of identifying all members of the class, as originally defined by plaintiffs, because of the fact that defendants had justifiably opposed such arbitrary reduction. Judge Griesa also erred in assuming that the major portion of such cost was attributable to the identification of those persons whom plaintiffs had improperly sought to eliminate from the class, when the evidence did not establish that such was the fact.

In any event, it is clear that the Unaffiliated Defendants should not be required to pay any part of the cost of the notice to members of the class.

IN A CLASS ACTION, THE COST OF IDENTIFYING MEMBERS OF THE CLASS IN ORDER TO ENABLE PLAINTIFFS TO SEND THE NOTICE REQUIRED BY FED. R. CIV. P. 23(c)(2) IS PART OF THE COST OF NOTICE WHICH MUST BE PAID BY PLAINTIFFS.

A. It is Settled that the Cost of the Notice Required in a Class Action by Fed. R. Civ. P. (c)(2) Must Be Paid by Plaintiffs.

The decision of the Supreme Court in Eisen v. Carlyle Jacquelin, et al., 417 U.S. 156 (1974) has made it unmistakably clear that the plaintiffs in a class action must bear the cost of individual notice to all members of the class who can be identified through reasonable effort.

The Supreme Court's opinion stated, at pages 176 and 177, that "each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs. * * * we also agree with the Court of Appeals that petitioner must bear the cost of notice to the members of his class".

It is respectfully submitted that a fair interpretation of the above-quoted language of the Supreme Court's opinion leads to the conclusion that the Supreme Court intended that the plaintiffs should bear the entire cost of notice to members of the

class to whom individual notice should be sent. The opinion nowhere limits the costs to be borne by plaintiffs to the cost of preparing and mailing the notice.

Prior to the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure, efforts to ascertain the names and addresses of potential class members through use of the discovery provisions of the Federal Rules were often denied either as a matter within the Court's discretion, Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (D. Mass., 1962), or as a matter falling outside the purposes of the pre-trial discovery rules, Crabtree v. Hayden Stone, Inc., 43 F.R.D. 281 (S.D.N.Y., 1967). In Neuwirth v. Merin, 267 F. Supp. 333 (S.D.N.Y., 1967), the Court denied a motion for Rule 34 discovery of a stockholder list for use in obtaining the names and addresses of others who might join as plaintiffs in a derivative action:

> "The stockholder list sought to be inspected and copied by the plaintiff does not 'constitute or contain evidence relating to ... matters' within the legitimate purview of F. R. Civ. P. 34 or any other pre-trial discovery and inspection procedure; ..." 267 F. Supp. at 337.

The theory behind these cases, as expressed in Cherner, was that plaintiff had no obligation to notify absent members of a spurious class of the pending litigation. To the extent that discovery of the names and addresses of members of the class is now permissible, it is because the 1966 amendments to Rule 23 and the holding in Eisen, supra, place the burden on plaintiff to give and pay for notice to the class. See Wolfson v. Solomon, 54

F.R.D. 584 at 591 (S.D.N.Y., 1972) where the Court ordered production of documents pursuant to Rule 34 to assist plaintiff in meeting his burden of showing that the elements of a class action were present. Since the discovery here sought is solely for the purpose of enabling plaintiffs to fulfill their obligations under Rule 23, the cost of such discovery should clearly be borne by plaintiffs.

B. The Cost of Identifying Members of the Class is Part of the Cost of the Notice Required by Rule 23(c)(2) and Should Be Paid by Plaintiffs.

The identification of members of the class who are to receive the notice required by Rule 23(c)(2) is patently a step which must be taken in order to give such notice. Consequently the cost of identifying class members is necessarily a part of the cost of notice to such members. Neither the opinion of this court in Eisen III nor the opinion of the Supreme Court in Eisen IV limit the notice costs to be borne by plaintiffs to the cost of preparing and mailing the notice. Accordingly, both logic and precedent require that the cost of identification of class members be borne by plaintiffs.

C. The Reason Stated by Judge Griesa for Requiring the Defendant, Oppenheimer Fund, Inc., to Pay the Cost of Identification of Class Members is Not Warranted by the Facts.

The only reason advanced by Judge Griesa for differentiating the cost of identifying class members from the other

costs of giving them the required notice was that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." But this is clearly not a valid reason because his opinion had previously stated that "plaintiffs' proposal [that members of the class who no longer were shareholders of the Fund should be eliminated from the class] would involve an arbitrary reduction in the class" because "if the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

Furthermore, the evidence adduced as to the cost of culling the members of the class from the names of all the shareholders of the Fund does not establish, as incorrectly assumed by Judge Griesa, that the major portion of the cost of such culling was attributable to the cost of identifying those persons who purchased shares during the pertinent period but are no longer shareholders of the Fund. The evidence on this point is discussed in detail under POINT I C of the brief of the Oppenheimer Defendants and will not be repeated here.

D. Even if the Cost of Identifying Class Members is Deemed to be a Cost of Discovery, Such Cost Must be Paid by Plaintiffs.

The pertinent decisions in the area of discovery make it clear that such cost must be borne by plaintiffs. It has long

been the law that "...a party has no right to require his opponent to make compilations of information when documents containing the material necessary for the compilations are available to the first party." See Leonia Amusement Corp. v. Loews Inc., 18 F.R.D. 503, at page 507 (S.D.N.Y., 1955).

In Triangle Manufacturing Co. v. Paramount Box Manufacturing Co., 35 F.R.D. 540, at page 542 (E.D.N.Y., 1964), the Court stated that where "compilation would require an inordinate amount of time and effort ... and since an order pursuant to Rule 34 would properly lie for the production of these records, it seems only fair that the party seeking such information be required to bear the burden of extracting and collating it."

In Konczakowsky v. Paramount Pictures, 20 F.R.D. 588, at page 593 (S.D.N.Y., 1957), the Court stated:

> "With regard to those interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to Rule 34 of the Federal Rules of Civil Procedure, or by doing a little footwork, as the case may be."

See also, United Cigar-Whalen Stores Corp. v. Philip Morris Inc., 21 F.R.D. 107 (S.D.N.Y., 1957), Wirtz v. Donovan Contracting of St. Cloud, Inc., 23 F.R. Serv. 2d 777 (D. Minn. 1968).

This procedure has now been recognized in Rule 33(c) of the Federal Rules of Civil Procedure which permits a party to respond to interrogatories by affording the party seeking discovery "... reasonable opportunity to examine, audit or inspect

[relevant business] records and to make copies, compilations, abstracts or summaries."

Where the information sought was in the possession of a non-party and the Court found that the search for and production of the information and documents would be time consuming and expensive, the party seeking discovery was required to pay the reasonable expenses thereof. See Celanese Corp. v. E.I. duPont De Nemours & Co., Inc., 58 F.R.D. 606 (D. Del. 1973).

Insofar as computerized records are concerned, the Manual for Complex Litigation (1973) at §2.715, notes: "Discovery requests relating to the computer, its programs, inputs and outputs should be processed under methods consistent with the approach taken to discovery of other types of information." The Manual notes that in circumstances where the information may not have "been recorded in the computer in a form which will be of the greatest benefit to the examining party," such examining party may be permitted "to develop his own programs for the analysis or reorganization of the machine-readable data so as to convert the information into a form that is more germane to the examiner's defense or prosecution of the action."

The only case which we have found involving the production of computerized information as part of the discovery process, Adams v. Dan River Mills, Inc., 54 F.R.D. 220 (W.D.Va., 1972), placed the cost of preparing the information on the party seeking discovery of such information. In that case, the Court referred to the 1970 revisions of Rule 34, and the notes of the

Advisory Committee on Rules pertaining thereto. The court held that computer in-put information such as computer cards or tapes could be the subject of discovery, and ordered "that the defendant produce its current master payroll file and the requested W-2 print-outs in the appropriate computerized form." The Court further ordered that the cost of preparing these documents be borne by the plaintiffs, who had requested the discovery.

For the foregoing reasons, the Unaffiliated Defendants respectfully submit that plaintiffs must bear the expenses of ascertaining the names and addresses of members of the class even if those expenses are treated as part of the cost of discovery.

CONCLUSION

This action should be dismissed because it is unmanageable as a class action. But if this court determines that the action is properly maintainable as a class action, so much of Judge Griesa's order as determined that the cost of identifying members of the class should be paid by defendant Oppenheimer Fund, Inc. should be set aside; and the District Court should be directed to file an order requiring plaintiffs to pay the cost of such identification.

Respectfully submitted,

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